United States Court of Appeals
FOR THE NINTH CIRCUIT.

No. 12229.

KAM KOON WAN, on His Own Behalf and on Behalf of All Other Persons and Employees of Defendant, Who Are Similarly Situated,
Appellants,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Appellee.

BRIEF OF APPELLANTS.

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Appellants,

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E. E. BLACK, LTD., a Hawaiian Corporation,
Appellee.

BRIEF OF APPELLANTS.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of the United States District Court for the Territory of Hawaii, Honorable J. Frank McLaughlin, District Judge, presiding. The judgment was entered in an action for unpaid overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., Par. 201 ff., and adjudged that certain of the appellants recover sums of money for unpaid overtime compensation and liquidated damages under the Act, and further adjudged that nothing was due others of the appellants, and allowed costs and attorneys' fees to the appellants. Judgment was filed on the 20th day of January, 1949.

The complaint alleged that appellants were employed by the appellee in a general construction business and were engaged in work necessary to interstate commerce

(R. 3), that the appellee for the six-year period prior the commencement of the action employed the appellan for work weeks in excess of that provided for under t Fair Labor Standards Act without paying the appellan overtime compensation, as required by the Act (R. 4 that the District Court had jurisdiction conferred up it under 28 U. S. C., Par. 41 (8) (Jud. Code, Par. 24 providing that the District Court shall have origin jurisdiction "of all suits and proceedings arising und any law regulating commerce"; and that jurisdiction w also conferred upon the District Court by 29 U. S. Par. 216 (b) (R. 3). Section 16 (b) of the Act provid that:

> "Any employer who violates the provisions Section 206 or Section 207 of this title shall be liab to the employee or employees affected in the amou of their unpaid minimum wages, or their unpaid ove time compensation, as the case may be, and in a additional equal amount as liquidated damag Action to recover such liability may be maintain in any court of competent jurisdiction by any o or more employees for and in behalf of himself themselves and other employees similarly sit ated. * * *"

Jurisdiction is conferred upon this court to review t judgment by Title 28, United States Code, Par. 12 which recites that:

> "The courts of appeals shall have jurisdiction appeals from all final decisions of the District Cour of the United States, * * * except where a direct r view may be had in the Supreme Court."

Under Title 28, United States Code, Par. 451, the ter "Court of the United States" includes the District Cour of the United States for the District of Hawaii.

The District Court ordered a partial summary judgment based upon Section 9 of the Portal-to-Portal Act of 1947 (29 U. S. C., Par. 258). The appellants contested the constitutionality of Section 9 of the Portal-to-Portal Act of 1947, and base their appeal to this court in part upon the constitutionality of said Act, as well as on the appropriateness of its application under the facts of this case. Section 9 of the Portal-to-Portal Act provides as follows:

> "Sec. 9. **Reliance on Past Administrative Rulings, Etc.**—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

Jurisdiction of the District Court was alleged in Appellants' Complaint (R. 3) and was admitted in Appellee's Answer, as amended (R. 8, 19, 31).

STATEMENT OF THE CASE.

The named plaintiff-appellant, hereinafter referred to as plaintiff, started action for himself and on behalf of all other persons and employees of the defendant-appellee, hereinafter referred to as defendant, who were similarly situated, to recover back wages for six years prior to November 14, 1945, together with the liquidated damages provided for under the Fair Labor Standards Act of 1938, 29 U. S. C., Par. 216 (b) (R. 2-7), hereinafter called the Act.

The complaint alleged that the defendant was engaged in a general construction business, having contracts with private individuals, the City and County of Honolulu, the Territory of Hawaii, and the United States Government, and that the plaintiffs were employed by the defendant and were engaged by it in work necessary to interstate commerce (R. 3).

The complaint further set forth that the defendant employed the plaintiffs for work weeks of longer hours than the regular work week, as established by the Act, without paying them overtime compensation, as required, for such hours (R. 4), and that the exact number of weeks, hours, wages and kinds of work performed by the plaintiffs were unknown to them, but were known by the defendant (R. 5). The prayer for relief asked for, among other things, judgment for unpaid overtime compensation and for an additional equal amount as liquidated damages (R. 5). The action was filed on November 14, 1945 (R. 7).

The defendant filed amended answers, in which it admitted that the plaintiffs were employed by the defendant during certain times within said period, but denied that any of the plaintiffs were employed in work necessary to interstate commerce, or within the coverage of the Act

(R. 31, 32). Defendant admitted that certain of the plaintiffs worked in work weeks of longer hours than the regular work week, as established by the Act, but denied that it failed to pay the overtime compensation required by it (R. 32), and admitted that it had a record of the work, hours, wages and overtime paid to the plaintiffs (R. 33).

The answer set up the following specific defenses:

(1) the complaint failed to state a claim upon which relief could be granted (R. 33);

(2) none of the work performed by the plaintiffs was within the coverage of the Fair Labor Standards Act of 1938 (R. 33);

(3) after November 10, 1943, defendant paid time and one-half for all work in excess of forty hours per week to all of the plaintiffs who worked for it subsequent to that date (R. 33);

(4) Martial law was proclaimed throughout the Territory of Hawaii on December 7, 1941, by its Governor and continued until October 24, 1944; that during this period, the Territory was subject to military rule under orders issued by the Commanding General, as Military Governor, which orders fixed hours, wages and compensation, including overtime, which defendant was permitted to pay its employees; that the defendant, under compulsion, complied with the orders of the Military Governor relating to the hours and rates of pay paid to its employees during said period, and that such compliance constituted a good-faith reliance upon the orders of the Military Governor, so that plaintiffs are barred from bringing their action by Section 9 of the Portal-to-Portal Act, 1947 (29 U. S. C., Par. 258).

(5) that plaintiffs were barred from bringing their action by the territorial Statute of Limitations.

On a motion for summary judgment, the affidavits presented by the defendant in support of its motion recited that from December 7, 1941 to November 10, 1943, 80% of the total work done by the defendant was upon contracts with United States agencies (R. 25), and that after November 10, 1943, the defendant paid substantially all the plaintiffs at the rate of time and one-half for all work in excess of forty hours per week.

They averred that during the period of Martial Law from December 7, 1941 to October 24, 1944, defendant was in the category of a contractor and sub-contractor with the Federal Government and became subject to the orders of the Military Governor (R. 25); that such orders prescribed the hours and rates of pay for all employees, including the plaintiffs (R. 26); that the defendant paid compensation prescribed under compulsion of Military Orders in good faith reliance upon the Military Orders (R. 26), that the defendant was on a list of contractors who were doing work within the Territory of Hawaii, which list was prescribed by the Military Governor; that the defendant, as a contractor on such list, was obliged to obey the commands of the Military Governor with respect to the payment of wages, hourly rates and overtime, and the release or discharge of employees employed by it during said period, and that the defendant in good faith followed the Military Orders (R. 26).

The Military Governor had issued, among others, Military Order No. 38 (R. 59), whereby all employees of contractors such as the defendant were "frozen" to their jobs, their wages were "frozen", and their regular and overtime hours prescribed. General Orders No. 91 issued March 31, 1942, revoked General Orders No. 38, and established new policies concerning wages, hours of work, overtime and the use of labor (R. 62). It further contained the statement:

"Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh-Healey Public Contracts Act" (R. 62).

The order provided that the normal work week on war projects in the Territory of Hawaii shall be six days of eight hours each, and that time and one-half the regular rate would be paid for overtime in excess of forty-four hours, or in excess of eight hours in one day (R. 63).

There was no pleading or averment before the court on Motion for Summary Judgment that set forth that defendant made any inquiries of the Military Governor or any administrative agency as to whether he should comply with the military orders or the Fair Labor Standards Act.

The District Court took judicial notice of the Military Orders and the existence of Martial Law in the Territory of Hawaii (R. 36-39).

The clause "Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh-Healey Public Contracts Act", did not appear in any of the other orders affecting labor, except Order No. 40 (New Series) (R. 37 Footnote), dated November 1, 1943.

The trial court ordered a partial summary judgment for the defendant against all the plaintiffs dismissing their claims for the period of November 10, 1943, to November 14, 1945, on the ground that all the plaintiffs were paid as required by the Act for that period, and further dismissing the claims for the period December 7, 1941, to November 10, 1943, on the ground that the defendant had established a good faith defense under Section 9 of the Portal-to-Portal Act. This left at issue the period from November 14, 1939, to December 7, 1941, as it applied to

the jobs performed by the defendant during that period (R. 87-88).

A Motion for Rehearing on the Ruling for Partial Summary Judgment was filed on March 11, 1948, which Motion for Rehearing was denied by the court (R. 68). Subsequently, a stipulation was entered into between the parties setting forth the nature of the work performed by the defendant's employees. The jobs covered under the Stipulation were segregated into three classes: I. Federal Government; II. Territorial Government; and III. Private Industry.

The terms of the stipulation are set forth at pages 69 to 76 of the record. In its ruling on the stipulation, the District Court held that the work performed by the defendant for the Federal Government, with exception of the Federal Building housing a Postoffice in Hilo, Hawaii, was not within the scope of the Fair Labor Standards Act, because it was work for the Government upon Military reservations, and was substantially all new construction; hence, it was not commerce or production of goods for commerce, as defined under the Act (R. 79).

Of the two remaining classes, the court ruled that certain of the jobs were not covered by the Act, because they were new construction and work for the government on Military reservations (R. 85, 86). Others were purely a local operation unrelated to commerce or the production of goods for commerce (R. 85, 86).

The balance of the projects were found to be covered by the Act and are not a subject of this appeal. At a hearing after the ruling on the jobs covered, pursuant to the stipulation, testimony by defendant was that defendant failed to pay overtime compensation as prescribed by the Act for the period November 14, 1939 to December 7, 1941

and the amounts of the claims of the plaintiffs were ascertained in relation to those jobs determined to be covered for this period (R. 108-115, Exhibit 1, A, B, C).

Judgment was filed January 20, 1949 (R. 95).

This appeal is taken from those determinations by the district court that the "defendant was not liable for work done subsequent to December 7, 1941, because defendant paid plaintiff(s) in good faith, and in conformity with and in reliance on the rulings of the Office of the Military Governor of the Territory of Hawaii, and that such payments were in fact made in good faith and in reliance on said rulings, regulations, and orders, and as a matter of law under Section 9 of the Portal-to-Portal Act constitute a defense to the claims of plaintiff(s) for the period December 7, 1941 to and including November 10, 1943" (R. 89-90).

Appeal is also taken from the determinations based upon stipulated facts that certain of the jobs performed between November 14, 1939 and December 7, 1941 were not in interstate commerce, and from that part of the judgment based upon said determinations (R. 89-90).

Notice of appeal from the final judgment entered in this case was filed by the plaintiffs on February 15, 1949 (R. 96).

SPECIFICATION OF ERRORS.

I. The court erred in granting in part the motion of defendant for summary judgment based on Section 9 of the Portal-to-Portal Act of 1947, 29 U. S. C., Par. 258, on its theory that the affidavits of the defendant were sufficient "proof" within the meaning of Section 9 of said Act.

II. The court erred in ruling that the defendant was bound on threat of force to obey General Order No. 91 issued by the Military Governor in March of 1942, in view of the fact that the Order itself specifically exempted those employments covered by the Fair Labor Standards Act.

III. The court erred in holding that alleged fear of military sanctions under the circumstances of this case constituted a good-faith defense under Section 9 of the Portal-to-Portal Act of 1947.

IV. The court erred in ruling that the order of the Military Governor was a "regulation, order, ruling, approval or interpretation" of any agency of the United States within the meaning of Section 9 of the Portal-to-Portal Act.

V. The court erred in ruling that Section 9 of the Portal-to-Portal Act of 1947, was constitutional, and that it did not deprive plaintiffs of property without due process of law.

VI. The court erred in ruling that certain of the work performed by the plaintiffs for the defendant before December 7, 1941, was not within the scope of the Fair Labor Standards Act (R. 79, 85, 86).

SUMMARY OF ARGUMENT.

The appellant employees have appealed from the judgment because of several substantial errors committed by the trial court in entering the judgment. In considering the appellant's claim under the Fair Labor Standards Act, it must be recognized that the nature of the claim is one of remedial action taken against the employer for his violation of the Fair Labor Standards Act.

The defense of good faith pleaded by the appellee arises under the Portal-to-Portal Act of 1947 and as such is equivalent to an exemption under the Fair Labor Standards Act. It is the well-settled rule that the remedial provisions of the Act are to be given a liberal interpretation, while the exemptions on the other hand are to be given a narrow construction and are restricted to those persons who come plainly and unmistakably within the terms and spirit of such exemption. It was not the intention of the Portal-to-Portal Act to repeal the remedial provisions of the Fair Labor Standards Act.

In considering whether or not the employer is to be excused from liability because of his failure to pay overtime compensation, as provided for under the Fair Labor Standards Act, the court must be satisfied that a defendant has "pleaded and proved" the same. An affidavit does not meet the requirement of proof.

The good faith of the employer can only be ascertained after the court has delved into all the facts and circumstances surrounding the good faith reliance. The burden of proof is placed specifically upon the employer. "Good faith" is measured by an objective test, namely, did the employer, in failing to pay the overtime compensation, act as a reasonable, prudent man would have acted under

the same or similar circumstances? "Good faith" also requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.

In the case at bar, there is no objective action taken other than the so-called compliance with the order. Good faith cannot adequately be appraised on the basis of affidavits alone. It is an ultimate fact which is determined to exist or not after a full trial, examination of witnesses concerning notice of facts which would put the employer on inquiry, and the objective steps taken which a reasonable, prudent man would take under the circumstances.

The military order relied on by the employer was a basis for his good-faith defense, contained a phrase therein which should have put the employer on notice that he was to comply with the Fair Labor Standards Act, rather than with the body of the order. There was no attempt by the Military Governor to interpret the Fair Labor Standards Act as being applicable or inapplicable to the employer herein. As a matter of fact the military order shied away from the possibility of infringing on the scope of the Fair Labor Standards Act. But assuming that it did, the law is clear that the civil law must prevail when in conflict with the military rule. The whole purpose of the order was to maintain standards at the greatest level possible approaching the Fair Labor Standards Act and the Public Contracts Act, not to tear down those conditions.

The good-faith reliance claimed by the employer, here does not arise out of the usual situation, where the employer was in doubt about the applicability of the Fair Labor Standards Act, inquired of a governmental agency and was told that the Fair Labor Standards Act did not apply, but rather the good-faith reliance claimed by this

employer is one where he knew that he was covered by the Fair Labor Standards Act, but claimed that the military government required him to violate the civil law and comply with the military rule, despite the fact that he knew that he should have obeyed the Fair Labor Standards Act. The employer claimed that he had to obey the Military Governor, and such obedience to his order constituted a good-faith reliance within the meaning of Section 9 of the Portal-to-Portal Act.

The appellants maintain that payment to the employees in conformity with the military order was not such a good-faith reliance. The actual facts and circumstances belie any good faith. First, defendant failed to comply with the Fair Labor Standards Act during the period of November 14, 1939, to December 7, 1941. Secondly, the military order, upon which defendant claims to have relied, provided for the exception of the appellant employees from the ambit of the order. Third, on and after November 10, 1943, defendant complied with the Federal Law, despite the fact that the Military orders and the Martial Law continued until October 24, 1944. Fourth, appellee never made any inquiries as to whether or not he should comply with the military order or the Federal Law as a reasonable man would have done. The defendant had a remedy for any illegal action which the Military Governor might take under color of his order. The employer could resort to the Federal District Court for a Writ of Habeas Corpus where he would be saved from the military decree.

The order of the Military Governor is not an administrative one, but rather it is an executive order, pursuant to which administrative action is taken, nor was the order the kind contemplated by the Act, since the Military order does not embody in it the same concept as a regulation or interpretation which is made pursuant to a statute or

executive order, nor is the order that of an agency of the United States.

While the Portal-to-Portal Act does not define "agency", other definitions indicate that in order to have agency action, only action by top agency officials can be treated as agency action. Here in the chain of command, the Military Governor of Hawaii was far from the top level necessary to be an administrative agency. The Military Government of Hawaii was not an agency of the United States also for the reason that it represented a Territorial Government it was military authority exercised in the field in time of war, and it was a function which expired at the termination of the war, all of which reasons exclude it from statutory definitions of the term.

The Portal-to-Portal Act of 1947 is unconstitutional because it violates the Fifth Amendment of the Constitution of the United States, in that it deprives workers of their vested rights, without due process of law. The rights granted by the Fair Labor Standards Act became vested in the worker immediately when he put in his time. The obligation of the statutory payments became fixed as of then, and when Congress enacted a law subsequent to the performance of work, which under certain circumstances did not require the employer to pay the overtime compensation provided for in the law, it deprived the worker of their vested rights. To permit Congress to enact such legislation retroactively would be to reward the employer who can hold out in the payment of his just debts until the law is changed, and to penalize the employer who pays his just debts.

Certain of the projects upon which the appellant worked during the period of 1939 to December 7, 1941 contrary to the trial court's holding, were covered by the

Fair Labor Standards Act, and the trial court should have so held. The fact that work is performed for the government on a cost-plus-fixed-fee-contract basis does not take the work out of interstate commerce. New construction of an instrumentality of commerce does constitute commerce within the meaning of the act.

The judgment of the court below, as herein indicated, is completely unsound in several respects and very weak in others. For these reasons it should be reversed.

ARGUMENT.

I.

A Motion for Summary Judgment Based on Section 9 of the Portal-to-Portal Act of 1947 Does Not Properly Lie Since Affidavits Are Not "Proof" Within the Meaning of That Section.

Under Section 9 of the Portal-to-Portal Act of 1947 (29 U. S. C., Par. 258), an employer may establish as a special defense to his failure to pay minimum wages or overtime compensation under the Fair Labor Standards Act, that his failure to pay was in good faith in conformity with and in reliance on an administrative regulation of a United States Agency. The pertinent language of that section is:

> "* * * no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice of enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established shall be a bar to the action or proceeding * * *"

However, such a defense cannot be legally established by the method of a Motion for Summary Judgment.

A. The remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation while exemptions therefrom are to be narrowly construed.

Since the Fair Labor Standards Act was enacted in 1938, it has become the well-settled rule that the remedial provisions of the Act are to be given a liberal interpretation, so that the Act's words will accomplish the purpose at which the Act is aimed. **United States v. Rosenwasser,** 323 U. S. 360, 362, 363, 89 L. Ed. 304; **Brooklyn Savings Bank v. O'Neill,** 324 U. S. 697, 89 L. Ed. 1296; **Roland Electric Co. v. Walling,** 326 U. S. 657, 90 L. Ed. 383, 389.

On the other hand, exemptions from the Act are to be given a narrow construction, and are restricted to those persons who come "plainly and unmistakably within the terms and spirit" of such exemption. **Phillips v. Walling,** 324 U. S. 490, 493, 89 L. Ed. 1095, 1098, 1099; **Jackson v. Northwest Airlines,** 70 F. Supp. 501.

That Congress did not intend to repeal the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act is apparent from statements made by sponsors of the Portal Act, in both Houses of Congress. Statement of Senator Wiley, 93 Congressional Record, Part 4, Page 4270.

Judge Nordby, in **Jackson v. Northwest Airlines,** 76 F. Supp. 121, 125 said:

> "At the outset, the relationship between the Fair Labor Standards Act and the Portal-to-Portal Act of 1947, and the effect of the Portal-to-Portal Act upon the Fair Labor Standards Act, must be determined and clearly understood. The Portal-to-Portal Act does not purport to amend or repeal any part of the Wage and Hour Act by its express terms. A reading of the Portal-to-Portal Act shows that it

supplements the Wage and Hour Act, and by its very nature and terms must be read as a part of it. In effect, although not in name, it is an amendment. It limits the Fair Labor Standards Act operation in some instances and changes its interpreted meaning by clarifying the Act's meaning in other instances. But, as pointed out by the Wage and Hour Administrator in his Interpretative Bulletin issued in November, 1947, the Portal-to-Portal Act nowhere purports to change or restrict the purposes and objectives of the Fair Labor Standards Act. These purposes and objectives still remain. **29 Code of Regulations, Chapter V, Part 790, Section 790.2.** Consequently, Sections 9 and 11, like the remainder of the Portal-to-Portal Act, must be interpreted and applied with that fact in mind and with a view to effectuating the purpose and intent of the Portal-to-Portal Act without destroying the objectives and purpose to which it subscribes."

These rules of strict construction are applicable to the special defense provided for in Section 9 of the Portal-to-Portal Act, which results in an exemption from liability under the Fair Labor Standards Act. Senator Cooper of Kentucky, a member of the Senate Sub-Committee and Conference Committee, in the Senate debate on the good faith defense of Section 9, said (93 Cong. Rec. 4451, May 2, 1947).

> "It is my personal opinion that a court should interpret this section strictly. The burden of proof is placed upon the employer. I believe that the courts should require proof of reliance and proof of good faith" (App. A).

The term "plead and prove" of Section 9, therefore should be strictly construed also, and the defense should

not be deemed as proved upon the mere filing of an affidavit.

B. **Under the Portal-to-Portal Act good faith can only be ascertained from all the evidence and circumstances.**

To appraise good faith, under a given set of circumstances, there must be a probing by the court into the complete factual picture. This cannot be done by simple affidavit, even though it go undenied. Proof, real and substantial, must be adduced going to the crux of the "good faith." Conduct of the defendant in relation to the order, matters which would put him on notice, demeanor of witnesses, all go to the matter of proving the good faith. As was said in **Jackson v. Northwest Airlines, Inc.**, 76 F. Supp. 121, at page 125:

> "Section 9 requires by its specific terms that defendant must plead and prove that the omission to pay plaintiffs according to the Fair Labor Standards Act was (1) in good faith, (2) in conformity with and (3) in reliance upon, (4) any administrative regulation, order, ruling, approval or interpretation of any agency of the United States or any administrative practice or enforcement policy of any such agency with respect to class of employers to which he belonged. Thus, the burden of proof is placed specifically upon defendant, and that burden must be sustained by defendant with respect to each of the four requirements."

Burke v. Mesta Machine Co., 79 F. Supp. 588; **Ferrer v. Waterman Steamship Corp.**, decided May 9, 1949, 8 W. H. Cases 773, 16 Labor Cases, Pars. 65, 130.

The trial court quoted approvingly from the interpretation of November 18, 1947, by the Administrator of the

Wage and Hour Division, Section 790.15, 12 F. R. 7662, in which the Administrator states that,

> "One of the most important requirements of Sections 9 and 10 is proof by the employer that the act or omission complained of and his conformance with and reliance upon an administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy, were in good faith. The legislative history of the Portal Act makes it clear that the employer's 'good faith' is not to be determined merely from the actual state of his mind. Statements made in the House and Senate indicate that 'good faith' also depends upon an objective test—whether the employer, in acting or omitting to act as he did, and in relying upon the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy, acted as a reasonably prudent man would have acted under the same or similar circumstances. 'Good faith' requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry."[1]

This statement of good faith has also been adopted by the courts in the cases of **Burke v. Mesta Machine Co.**, supra, and **Ferrer v. Waterman Steamship Corp.**, supra.

But the trial court in discussing this test (R. 46-47) failed to apply the objective criterion. The court below relied upon the subjective representation that the defendant had honest intentions. The only objective matter in the record on motion for summary judgment is a statement that the defendant complied with the Military order

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1 "We consider that the rulings, interpretations and opinions of the Administrator under this Act (FLSA), while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." **Skidmore v. Swift & Co.**, 323 U. S. 134, at 140, 89 L. Ed. 124, at 129.

(R. 26). There is nothing objective in the record presented to the trial court to support the proposition that the employer, in failing to pay overtime compensation, and in relying upon the regulation and orders of the Military Governor, did what a reasonable, prudent man would have done under the same or similar circumstances. There is no showing of any investigation or inquiry concerning the applicability of the body of General Orders No. 91 to this employer. There is no showing of the mechanics of how the order was relayed to employees involved in making up payrolls, what instructions they were given, whether or not there was a change in payment of overtime as a result of the order. The presence or absence of these matters would have to be considered on the question of good faith.[2]

This court has held that it is not proper to order a Summary Judgment in favor of the person setting up a defense, when such a defense is supported only by pleadings and affidavits and the statute requires that the matter be proved. **United States v. Lindholm,** 79 F. (2d) 784 (CCA 9) (1935). That case involved a suit against the United States for disability payments under a war-risk insurance policy. The United States filed answer in the form of a general denial. The plaintiff moved for Summary Judgment and filed affidavits in compliance with the statute of the State of California. The Government failed to file counter-affidavits, and the trial court struck the answer and gave Summary Judgment for plaintiffs. The Government appealed. The Tucker Act, 24 Stat. 506, 28 U. S. C. A., Par. 763, which applied to suits to recover

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2 Appellee referred to a message from the Wage and Hour Administrator to a Wage and Hour Agent in Hawaii in one of its affidavits (R. 29). But the trial court did not base its decision on the communication from the Administrator, since the defendant made no claim that it relied upon the radiogram: "The reason for the inclusion in the attorney's affidavit of this interesting but nonusable fact is, therefore, not apparent" (R. 41-42).

debts under World War Veterans Legislation, and under which the suit was brought, provided as follows:

> "Should the District Attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules, as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, **unless he shall establish the same by proof satisfactory to the court.**" (Emphasis ours.)

This court stated that (P. 787),

> "Even apart from the application of the rule requiring an interpretation of the statutes waiving the Sovereign's immunity from suit strictly in favor of the Sovereign (citing cases), here is the clear repugnance between the two Acts. **Under the state statute (providing for summary judgment) the Federal Judge after a failure to file the defensive affidavits, finds himself debarred from proceeding with the case under any adopted rules and denied access to any satisfactory proof of the claim other than the affidavits, assuming the affidavits may be regarded as proof of the claim and in a manner preliminary to placing the defendant in default by the absence of the stricken answer.**" (Emphasis and explanation ours.)

This court held, that even in the face of such language in the statute, as, "Under such rules as the court may adopt in the premises", affidavit proof was insufficient. See also **United States v. Stevenson**, 79 F. (2d) 788 (1935, CCA 9).

Today, Rule 56, FRCP, would not press the theory of judicial economy to the point where plaintiff's cause of action is tried solely by the affidavit of the defendant.

Coming to the cases in which motions were made for summary judgments under Section 9 of the Portal-to-Portal Act in applying that section to claims under the Fair Labor Standards Act, it is significant to note that in all the cases we have been able to find which deal with such motions, excepting only the instant case, the motion for summary judgment was turned down by the trial court.

Divens v. Hazeltine Electronics Corp., 79 F. Supp. 513; **Camiano v. Rifkin**, 77 F. Supp. 363; **Halsband v. Fuller Co.**, 119 N. Y. L. J. 901 (1948); 14 Labor Cases, Par. 64,387; **Sheppard v. American Dredging Co.**, 77 F. Supp. 73 (1948).

In the **Divens** case, supra, the District Court said (P. 514):

> "I think that this issue of good faith, depending, as it does, upon many factors, should be left to the determination of the trial court upon consideration of all the evidence adduced by both parties. Good faith cannot be established as a simple fact, such as a signature to a document. It is an ultimate fact—a conclusion to be drawn from all the circumstances. Only in rare situations can it be determined upon affidavits."

And in the **Halsband** case, supra, the court went even further. It said,

> "* * * acting in good faith and on reliance are hardly determinable on affidavits, replete though they are, by defendants and supplemented though they be by a wealth of exhibits lending apparent credence to defendants' contentions; but credibilities cannot be resolved in a motion under Rule 113, nor can the respectability of affiants be considered as contravening the plaintiff's allegations of a cause of

action under the Fair Wage and Hour Act and his averment in opposition to this motion; as on a trial the number of witnesses do not necessarily predominate, neither on a motion for summary judgment may the greater number of affidavits prevail over the one or few. In the Court's opinion the good faith and reliance are in the nature of mental abstractions and are matters of proof on the trial; this may impose an onerous burden on the defendants considering the volume of exhibits on this motion."

The court went on to say that for such determination it must necessarily await a trial, as a sound discretion cannot be based on affidavits to determine the good faith which is a condition precedent to be established by the defendant.

To emphasize the impropriety of ruling on "good faith" on a Motion for Summary Judgment, attention is called to the fact that on the final hearing when determination was made as to amounts owing the appellants for the period 1939 to December 7, 1941, the court adjudged that the appellee owed certain sums based on failure to comply with the overtime requirements. Surely violation of the Act during the period prior to the promulgation of the order would be a reflection on the employer's good faith reliance on the order and would be indicative of its continuing bad faith. This fact was not and could not be discovered, except on trial.

Placing the burden of pleading and proof on the employer would seem to be indicative of a continuing recognition by Congress of the remedial nature of the Fair Labor Standards Act and of the need for safeguarding the interests of employees. (For a discussion of proof of good faith in the Congressional debates as raised by the **Northwest Airlines** case, which was the subject of

much controversy in both the House and Senate, see Appendix A to this brief.)

Since the absence or presence of the good faith reliance on and conformance with the administrative rule, which is set up by the employer, is the ultimate fact to be determined by the court, this is a matter which should go to full trial so that the court may see and hear the witnesses and persons who relied upon the administrative ruling, and may appraise all the facts and circumstances surrounding the good faith reliance. Whether or not the employer did those things which a reasonable man would do under the same or similar circumstances can only be determined after a complete examination of the employer's witnesses. It cannot rest on the bald statement that "defendant was obliged under compulsion of Military order to pay the wages and overtime compensation prescribed in said Military order", and that the employer did pay compensation "in strict conformity with the Military orders" (R. 26).

The Trial Court's opinion refers to "no dispute at all concerning the facts", and to the further fact that the plaintiff did not file counter-affidavits (R. 44). To controvert the good faith of the employer, it was not necessary to file counter-affidavits or take issue with the actual facts that were evidentiary. The point is that, assuming the veracity of all the factual statements of defendant's affidavits there is not sufficient proof to make out a case of good faith reliance upon and conformity with an administrative regulation, etc. Whether or not the employer acted in good faith was the final fact to be determined by the court, and not something which could be established by affidavits.

II.

The Order of the Military Governor Did Not Compel the Defendant to Pay Compensation Prescribed in the Military Orders and Wage Schedules Issued Pursuant Thereto.

The trial court held that the defendant had "no freedom of choice" (R. 45), and that the defendant could only do what he was ordered to do. "The Constitution and Federal and Territorial Law was cast aside", he said, "and the defendant and all other persons in Hawaii were told by military order, what to do, and theirs was not to question or to reason why." The orders referred to by the court are General Orders No. 38, dated 20 December, 1941, and General Orders No. 91, dated 31 March, 1942, by the Military Governor (R. 59, 62).

Briefly, Order No. 38 "froze" all wage rates for employees on the Island of Oahu. Employees deriving support from Federal funds were "frozen" to the respective employers as of December 7, 1941, an eight-hour day was established with time and one-half to be paid in excess of eight hours and certain labor contracts were suspended (R. 59-60).

General Order No. 91 revoked Order No. 38 and set up, in lieu thereof, new policies governing wages, hours, overtime, and use of labor in the Territory of Hawaii (R. 62-66). Section 2 of said order contained this important clause:

> "Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh-Healey Public Contracts Act."

Here again a schedule of wages was established, hours of work, and a basis for overtime pay was laid down.

Federal, Territorial, and City and County of Honolulu Civil Service employees were exempt from the provisions pertaining to wages, and these same employees, in addition to supervisory employees of the contractors, were exempt from the provisions pertaining to hours of work and overtime.

It is submitted that the clause above quoted, commencing "nothing herein", clearly exempted the employees of the defendant from the general provisions of Order No. 91 when they worked on jobs to which the Fair Labor Standards Act applied. This saving clause excepted jobs covered by the Act from the ambit of the order, and puts employers on notice that the Wage and Hour Act was still supreme. The warning was placed at the beginning of the Order, so that all contractors who did work which was covered by the Fair Labor Standards Act, or the Public Contracts Act, need not comply with the body of the order, insofar as the hour standards as prescribed by the Act were greater than those under the order. If the operation was covered by the Wage and Hour Law, at the time of the promulgation of the order, that law could continue to control the activity. Otherwise, what would be the purpose of including this clause? If the Military Governor intended that all contractors should comply with the order, rather than the law, regardless of the activity engaged in, the order would specifically have so stated, or, at least, it would have remained silent on the relationship between the Act and the order, so that he could have compelled compliance with the order, even if the order were "probably unlawful" (R. 32).

But when he says, "Nothing herein shall be construed as superseding * * *," there can only be the conclusion that the intention is that the "laws shall alone govern" and that the order must yield.

Under any theory, the agency making the rule, regulation, order, approval or interpretation must be an agency which purports to rule or interpret the Fair Labor Standards Act, whether it be authorized so to do or not. The Military Governor did not attempt to do this. Where an order is issued, specifically excluding the Act from its scope, the interpretation of such an order should be that the provisions of the Act are unaffected and not the reverse.

Any position that the Military Governor attempted to interpret the Fair Labor Standards Act by the "Nothing herein * * *" clause as being inapplicable to contractors like the defendant, is untenable. The wording of the order is too clear to leave room for such a strained construction. We believe that only the opposite conclusion is possible: that where the order and the law were in conflict the order specified that the law was to be maintained. This was not only desirable, but consistent with specific congressional policy, particularly since that policy did not limit the hours of labor but went only to methods of compensation for those hours.[3]

Before the war there was no limitation on the number of hours which could be worked, but as to work covered by

3 29 U. S. C., Par. 202, sets forth the Congressional policy in the Fair Labor Standards Act:

"(a) The Congress hereby finds that the existence, in industries engaged in commerce, or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce, and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce, and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is declared to be the policy of Sections 201-219 of this title through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." 52 Stat. 1060.

the Act, extra hours were made more burdensome for the employer by the overtime compensation provisions. It is a reasonable inference that the intention of General Orders No. 91 was to extend at least part of those burdens to employers on projects which did not involve interstate commerce. The purpose of the order was to prohibit the employers from taking advantage of the war emergency and to work their employees unlimited hours without one day of rest, ostensibly under duress of the war, and without adequate compensation. This is confirmed by Section 2 (2) of the order, which provides for overtime compensation and by Section 2 (3), which provides for one day of rest in every seven days.

With respect to the one day of rest in every seven days, and the maximum work week, those provisions were applicable to all employees in the territory, since they were in no way in conflict with the Fair Labor Standards Act, that Act being silent on maximum hours. The provisions relating to overtime, however, were in conflict with the Fair Labor Standards Act, and those provisions in the nature of additional benefits to employees not otherwise entitled to them under the Fair Labor Standards Act could properly apply only to those who were not covered by the Act.

Thus an examination of the order as a whole indicates that its purpose was to fix maximum limitations on hours of employment for all employees, and to improve wage conditions for those not already protected by the Act, rather than to undermine existing protections afforded by the Act.

It was the desire of the Government, military as well as civil, to encourage as full production as was possible without destruction of health, and at the same time to provide adequate compensation. There was no effort on the part of

the Government to be penurious. It encouraged employers to abide by the adopted standards, rather than violate them, and as an expression of such encouragement Orders No. 91 recognized the superior weight of the law and bowed to it.

That the civil law has superior weight and that the defendant was not bound on threat of force to obey the military order is demonstrated by the case of **Duncan v. Kahanamoku**, 327 U. S. 304, 322, 90 L. Ed. 688, 699, in which Justice Black, speaking for the court said:

> "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. **Ex parte Quirin**, 317 U. S. at 19. Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country, and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the peoples throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. See **Ex Parte Milligan**, 4 Wall. (U. S.) 2, 18 L. Ed. 281; **Chambers v. Florida**, 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 472. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government. Military tribunals have no such standing. For, as this court has said

before: '* * * the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the republic who advocates the contrary. The established principle of every free people is, that the laws shall alone govern; and to it the military must always yield.' **Dow v. Johnson**, 100 U. S. 158, 169, 25 L. Ed. 632, 636."

The court below apparently gave no weight to the principle "that the laws shall alone govern; and to it the military must always yield," and would, on the contrary, permit the defendant to ignore the law and disregard the policy of both the military and civil government under color of the body of the military order, ignoring the proviso, stating that it relied upon it in good faith and conformed therewith. That its action was not in good faith, we shall show later on in this brief. Orders No. 91 in reference to overtime matters sought to preserve minimum standards in those activities not covered by the Fair Labor Standards Act and it tried to assure to the individual one day of rest, except in the cases of emergencies, with the approval of the Chief of Military or Naval Service concerned (R. 63). In the face of such clear and unequivocal language, as is used in the saving clause, it would be a travesty to hold that the defendant was bound on threat of force to obey General Orders No. 91.

III.

Alleged Reliance on the Military Order Under the Circumstances of This Case Did Not Constitute a Good-Faith Defense Under Section 9 of the Portal-to-Portal Act of 1947.

The application of the good-faith defense of Section 9 of the Portal-to-Portal Act to the facts of the instant case is indeed a novel one. The court below put it as follows.

"Perhaps Congress in passing the Portal-to-Portal Act did not have its attention directed to the situation which developed in Hawaii due to power usurped and exercised by the Army during this period. But it does seem to me to be within the spirit of the legislation and to present a defense which in its nature is even stronger than the typical Section 9 defense" (R. 48).

In other words, it was not a situation wherein an administrative agency issued a regulation, rule, order, etc., and the employer relied thereon in good faith, but rather as the court stated, a situation wherein the employer was coerced in spite of the fact that he knew or should have known that the military order was contrary to the law. "The situation was one of military dictatorship and one did as ordered to do" (R. 45).

A. What constitutes good faith?

The Portal-to-Portal Act itself does not contain a definition of "good faith." The absence of this definition gave a great deal of concern to Congress, as exhibited by the Congressional debates. Senator McGrath, in his statement on the Portal-to-Portal Act, in discussing the good-faith defense, in 93 Congressional Record, Part II, p. 2255, said:

"The phrase 'good faith' has been judicially defined in numerous instances. These definitions have varied from case to case. They are almost as varied as causes which give rise to portal-to-portal suits. In some decisions it has been held to denote honesty of purpose, the actual existing state of mind, without regard to what it should be from given standards of law and reason. In others, however, it has been defined as honesty of intention, and freedom of knowledge of circumstances which ought to put the defendant upon inquiry. This Bill gives not the slightest clue to which of these, or

the infinite number of other definitions, it refers. Evidence of lack of good faith is always difficult to secure, and is of doubtful probative weight, save in the most obvious situations."

In **Burke v. Mesta Machine Co.**, supra, Judge Gourley for the Western District of Pennsylvania in a considered opinion concerning the good-faith defense, said:

> "The test of good faith is an objective one, and not the actual state of mind of the employer * * *.
>
> " 'Good faith' cannot be established as a simple fact. It is an ultimate fact—a conclusion to be drawn from all the circumstances * * *. The defense of 'good faith' is intended to apply only where an employer innocently and to his detriment followed the advice as it was laid down to him by governmental agencies **without notice that such interpretations were claimed to be erroneous or invalid.**" (Emphasis ours.)

In **Cochran v. Fox Chase Bank**, 209 Pa. 34, 58 A. 117, 118, the court stated:

> "Good faith is defined to be honesty of intention and **freedom from knowledge of circumstances which ought to put the holder upon inquiry.**" (Emphasis ours.)

In **Siano v. Helvering** (D. C. N. J.), 13 F. Supp. 776, 780, and in **Colket v. St. Louis Union Trust Co.** (C. C. A. 8), 52 F. (2d) 390, 391, this definition was arrived at

> " 'Good faith' requires an honest effort to ascertain the facts upon which exercise of power must rest, and an honest determination from such ascertained facts."

The Administrator of the Wage and Hour Division in his interpretation of November 18, 1947, Section 790.15, **12 F. R. 7662**, incorporates the test of a reasonably prudent

man acting under the same or similar circumstances in his test of good faith. Whether there was good faith reliance upon the order of the Military Governor by the appellee must be determined in the light of these definitions.

B. **Failure to pay by appellee was not in good faith and in reliance on orders of Military Governor.**

The simple, abbreviated facts pertinent to whether or not the appellee omitted to pay overtime under the Fair Labor Standards Act in good-faith reliance and in conformity with the order of the Military Governor are these. From November 14, 1939 to December 7, 1941, the appellee employed workers, who were covered by the Fair Labor Standards Act because of the activities which they performed, and failed to pay them overtime compensation as prescribed by the Act (R. 114). Military orders were issued on December 7, 1941, and March 31, 1942, upon which appellee claims it relied in good faith, as a defense for not paying statutory overtime. The appellee did work on a cost-plus-a-fixed-fee basis (R. 116). Prior to December, 1942, the Wage and Hour Administrator had ruled that cost-plus-a-fixed-fee contractors were covered by the Fair Labor Standards Act.[4]

The clause "Nothing herein * * *" appeared only in General Orders No. 91 and No. 40 (New Series), dated November 1, 1943 (R. 37). On and after November 10, 1943 appellee complied with the requirements of the Fair Labor Standards Act (R. 42), although the Military Government and the orders issued by it obtained until October 24, 1945 when it was terminated by Presidential Proclamation No. 2627, 9 F. R. 12831 (R. 36). There is nothing in the record on Motion for Summary Judgment to indicate whether

4 **Glowienke v. Hawaiian Dredging Company,** Northern District Illinois, Eastern Division, January 6, 1948, 14 Labor Cases, Paragraph 64,343, 7 W. H. Cases 637.

the employer made any inquiries of the Military Governor or any administrative agency for a ruling as to whether or not he should comply with the Military orders or the Fair Labor Standards Act.

In view of these facts, it cannot be said that the employer in good faith relied on and conformed with the orders of the Military Governor.

From a reading of the Statute, Congressional Reports and debate, it is apparent that Congress by the good-faith defense sought to protect the employer, who found himself in this dilemma: He had inquired of an administrative agency whether he was bound by the Wage and Hour Law. He was told that he was not, and subsequently, he discovered that his employees were covered by the Act. The theory of the defense was that if the employer had done whatever he could to find out what the law was as to him and his employees in reference to the Act, and he was told he was not under the Act, he then had an equitable defense.

Congressman Gwynne, Chairman of the House Sub-Committee on the Portal-to-Portal Bill, described the good-faith defense on the floor of the House as follows (93 Congressional Record, Part II, P. 1941, February 27, 1947):

> "* * * The net result has been that many small employers have gone to the persons responsible for enforcing the law, have gotten rulings, interpretive bulletins, and have relied on them, only to find that next year the ruling has been changed by the Administrator, or that a Court decision has changed it.
>
> "Regardless of his good faith, the employer finds himself subject to suit, not just for the amount involved but for twice the amount involved, together with attorneys' fees and costs."

And Congressman Walter said, **93 Congressional Record** Part IV, 4390:

> "* * * The defense of good faith is intended to apply only where an employer innocently and to his detriment followed the law that was laid down to him by governmental agencies without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him. * * *"

Congressman Keating in the Congressional discussion said:

> "Where an employer has notice of the invalidity of a ruling, or where he has notice of conflicting rulings of different departments of the government the good-faith defense cannot be invoked." **93 Congressional Record, Part IV, 4391.**

And Congressman MacKinnon, a member of the House Labor Comimttee, in presenting the conference report stated that an employer

> "cannot be said to have relied in good faith when he picks one of the rulings on which to rely and, particularly, it seems to me, under the language of the bill, when he relies on the ruling that is most favorable to his, the employer's interest."
>
> 93 Cong. Record, Part IV, P. 4391, May 1, 1947.

The defense was not intended to protect the kind of situation we have here, where the employer for a period of years was violating the Act, and then attempted to seek the cover of an order claiming that the **body** thereof affected his employees, where the order itself provided that the Fair Labor Standards Act should supersede the

order, and the employer knew or should have known that the military order was invalid (R. 45, 48). With a history of previous violations, this can only be construed as a reliance on that part of the order which was "most favorable to his, the employer's interest." Of this kind of situation the court, in **Burke v. Mesta Machine Co.**, supra, said:

> "No one in either House of Congress spoke with reference to an employer who sat back for years, while the Administrator issued comprehensive rulings and interpretations to the effect that practices in which the employer was engaging were illegal, and then seized upon an highly equivocal 'action' by a Wage and Hour inspector to relieve him of liability. The statute was not couched in terms applicable to such a case and was not intended to effect such a result."

Where a saving provision is included in the order, it militates even stronger against good faith because here was knowledge of fact, which ought to put a reasonable man on further inquiry. Failing to ask for a ruling, his good faith should be found wanting.

See **Bauler v. Pressed Steel Car Co.**, 81 F. Supp. 172, 176, wherein it was said:

> "* * * I think that an employer, to come within the protection of an administrative approval or interpretation must have followed the familiar routine of submitting a particular problem to the head of the agency for a ruling or opinion. An opinion letter of the head of the agency or his counsel, ruling on the question, interpreting the section of the statute in question in the light of the facts of the employer's situation or approving the employer's interpretation of the law, would come within the meaning of this section. I thing nothing less will do."

Also **Burke v. Mesta Machine Co.**, supra; Interpretive Bulletin, dated November 18, 1947, Section 790.15 (c), and (d), **12 F. R. 7662**, and generally, **Hoffman v. Todd and Brown, Inc.**, 8 W. H. Cases 348; **Reid v. Day & Zimmerman**, 73 F. Supp. 892, affirmed 168 F. (2d) 356; **Kerew v. Emerson Radio Corp.**, 76 F. Supp. 197; **Central Missouri Telephone Co. v. Conwell**, 76 F. Supp. 398, affirmed in 170 F. (2d) 641; **Wolferman, Inc., v. Gustafson**, 169 F. (2d) 759.

The trial court rejected the proposition that the "Nothing herein * * *" phrase found in the general orders made it impossible to conform to and rely upon Military orders in good faith. The court said this may be so, but

> "It is, however, of no significance, for as a matter of law, the defendant was charged with this notice anyway, and actually as an alert business entity must have known it was not paying and working its employees as directed to do by the Fair Labor Standards Act. **The important fact is that the defendant presumably would have complied with the Act if it could have and did so as soon as it could, but until the Military Orders allowed, compliance was impossible.'** (R. 48). (Emphasis ours.)

The argument that the "Nothing herein * * *" phrase was of no significance because the appellee was charged with notice as a matter of law anyway, is not a valid one. Actually, in all the good faith defense cases, the employee was charged with notice of the Fair Labor Standards Act as a matter of law, too, but it was because they relied upon a ruling of an Administrative Agency to the contrary and in good faith, that the court allowed such reliance as a defense. Here, there was no basis for reliance. The fact that the "Nothing herein * * *" phrase is included in

orders 91 and 40 (New Series), discounts among other reasons any good faith on the part of the employer.

The statement by the court below "that the defendant presumably would have complied with the Act if it could have, and did so as soon as it could," is contrary to the record. At that point of the proceedings, of course, it was not aware of the fact that the appellee had violated the law during the period when it could have complied with the Act, and, therefore, the court's statement that appellee would if it could was not altogether correct, because it could from 1939 to 1941, but did not. The facts concerning these violations were not proved until the final hearing.

The question of the good-faith reliance of the appellee upon the orders of the Military Governor is again raised by its course of conduct on and after November 10, 1943. It was agreed that from that date on the appellee paid all the appellants within the scope of the Act, in accordance with the Act's provisions (R. 42). General Order No. 40 (New Series) issued November 1, 1943, apparently was relied upon by the Trial Court as authority for compliance with the Act after November 10, 1943 (R. 39), but according to the Trial Court's opinion, the authority for compliance after November 10, 1943, was no different from the authority for compliance as of April 1, 1942 (Footnote 4, R. 37).

It is to be remembered that Military Government continued until October 24, 1944 (R. 36), so that it logically follows that if there was compulsion on April 1, 1942, the same sort of compulsion continued until October 24, 1944. If, as of November 10, 1943, appellee was no longer threatened by the compulsion of the orders, because of the "Nothing herein * * *" clause in Order No. 40 (New

Series), then it could not have been threatened as of 1 April, 1942, for the same reason. In other words, there couldn't have been good-faith reliance up to November 10, 1943, if the same practice of reliance did not continue for the life of the Military Orders. There is an obvious inconsistency in the position that the employer became subject to the orders of the Military Governor until October 24, 1944, and that during that period was obliged under compulsion to obey the Military order, when after November 10, 1943, it did not comply with the Military orders although they were in substantially the same form as they were on March 31, 1942.

"Good faith" cannot be realistically argued here because appellee did not actually obey the Military order. Obedience to the order would require him to follow the provisions of the Fair Labor Standards Act, and so, therefore, by seeking to come under Section 2 (b) of General Orders No. 91, he actually violated that order. As far as this employer was concerned, the "Nothing herein * * *" clause negated a good-faith following of Section 2, and made the balance of the order non-existent. For this employer there was no threat of punishment held over his head for compliance with the Fair Labor Standards Act rather than the order, but actually a mandate to comply with the Act.

C. **A coercive order complied with on a claimed threat of punishment, despite notice of violation of Fair Labor Standards Act is not a good-faith defense under Section 9**

An employer is not coerced into compliance with a military order by threat of punishment when he knows or should know that he is violating the Act by such compliance, and he may not plead such order as a good faith defense under Section 9 of the Portal Act.

Again we submit that the rule of narrow construction must be applied. The trial court recognized that the order was the result of "power usurped," and that it was not entirely the kind of defense that "Congress had indicated it was willing to recognize and to be within the aim and spirit of Section 9 of the Portal-to-Portal Act" (R. 49). But, nevertheless, the trial court maintained that it presented a "far stronger defense." That this is not the kind of defense contemplated by Congress, there can be no question. But the trial court believed that the employer had no alternative. This is not entirely true. He need not comply.

In **Duncan v. Kahanamoku**, 327 U. S. 304, 90 L. Ed. 688, the defendants committed civilian offenses, and were tried by a Military tribunal. The order of the Governor had suspended the privilege of the Writ of Habeas Corpus (327 U. S. 348), but nevertheless, the defendants challenged the power of the Military Tribunals by petition for writs of habeas corpus filed in the District Court of Hawaii. The District Court held that the Military tribunals had no such power and ordered that the men be set free. This court reversed and ordered the petitioners returned to prison, 146 F. (2d) 576. The United States Supreme Court reversed, and sustained the District Court. Here was an individual who was given relief by the courts from military edict. Similarly, the appellee here did not have to comply with the military orders, and if, perchance, conviction by the military did occur, appellee would have had the same recourse as Duncan and could nevertheless resort to the courts.

As has been indicated from an analysis of the record, the employer's "good faith" is far from the simple assertion purportedly presented by its affidavits on Motion for Summary Judgment. The lack of a clear-cut directive in

the order relied upon by the employer, the failure to comply with the Act prior to the promulgation of the military orders, the failure to ask for a ruling on how the order affects the employees, the subsequent compliance in face of the military orders, all indicate that the appellee was trying to seek out the most favorable terms that it could interpret for itself. These matters are a far cry from the good-faith defense, as contemplated by Congress, and the conduct of this employer should not be permitted to thwart the remedial purposes of the Fair Labor Standards Act.

IV.

The Order of the Military Governor Was Not a Regulation, Order, Ruling, Approval, or Interpretation of Any Agency of the United States Within the Meaning of Section 9 of the Portal-to-Portal Act.

On analysis of the statutory language of Section 9, it will be seen that the order relied upon by the appellee does not come within that class of administrative regulations, orders, rulings, approvals or interpretations, nor is it an order of any agency of the United States, as contemplated by Congress.

A. The order is not an administrative one.

The order issued by the Military Government is not administrative in nature, but rather is executive in nature. There is no question of any ministerial functions performed by the Military Governor in the order. The order itself establishes the law and is substantive. It sets forth what rates of pay shall be paid, the hours to be worked, when overtime shall be paid, and the control of the labor force. There is not present here a regulation ancillary to an executive order or statute, nor is there a ruling, approval, or interpretation pursuant to such executive order

or statute. The case of **Jackson v. Northwest Airlines, Inc.**, 76 F. Supp. 121, points out the distinction between executive and administrative capacity. There the defendant entered into a contract with the United States to modify bombers. The contract was executed for the government by a contracting officer of the Army Air Corps. The court said,

> "Thus, in that transaction, the Army Air Corps was not acting as an administrative agency. It was acting as a part of the executive branch of the government and in an executive, not in an administrative agency capacity" (p. 129).

The defendant there wrote to the Air Corps inquiring as to reimbursement in the event the Wage and Hour Act applied to its employees, and what the United States contemplated under the contract with respect to it. The court continued,

> "That the Air Corps gave the reimbursement guaranty and the instructions to defendant in its executive capacity as the United States and not as an administrative agency of the United States, follows from the fact that it acted for the government in making the contract and also in assuming to bind the government to guaranties made under it or as a result of it" (p. 129).

The military government by its executive decree usurped a legislative function. It substituted its edicts for that which was the expression of Congress, the representatives of the people. The words "administrative regulation, etc.," should be construed by the principle of ejusdem generis, denoting words in a series of the same kind (**Bauler v. Pressed Steel Car Co.**, supra). Applying this principle to the military order in question, it will readily be seen that the military order does not embody in it the

characteristic which is common to all the other words in the series, namely, that it be a ruling, or interpretation of a law or order as applied to a particular situation. The military order, having no meaning in common with the other terms in the series, should not be clothed with an administrative cloak, nor should it be held to be the kind of order meant by Congress as a basis for a valid defense.

B. **The order was not that of an agency of the United States.**

The term "agency" is not defined in the Portal-to-Portal Act. The Courts, however, have interpreted this term, as has the Wage and Hour Administrator. The Administrator's interpretation appears in Section 790.19 of his Bulletin of November 18, 1947, at **12 F. R. 7665.** This discussion was embodied in the opinion of the court in **Jackson v. Northwest Airlines, Inc.**, 176 F. Supp. 121, 127.

The Administrator relies for his definition of the term "agency" on Section 10, wherein the Act

> "expressly limits the meaning of the term to the official or officials actually vested with final authority under the statutes involved. Similarly, the definitions of 'agency' in other federal statutes indicate that the term has customarily been restricted in its usage by Congress to the persons vested under the statutes with the power to act for the government—those who actually have the power to act as (rather than merely for) the highest administrative authority of the government establishment" **(12 F. R. 7665).**

Applying this definition to the facts of the instant case, it is submitted that the Military Governor of Hawaii was not the agency of the United States. Such agency was the United States Army, as represented by the Chief of Staff,

who is authorized to speak as the Army rather than for it. While a subordinate officer in the Army may issue orders, such an order would not be one in the same category as an administrative order, as contemplated by the Portal-to-Portal Act.

In referring to agency the court in the **Burke** case, supra, said (p. 609):

> "The words of Section 9 further strengthen the conclusion drawn from the reports and debates that Congress was referring to rulings by authorized and responsible officials of the federal agencies, which could be termed rulings of the agency."
>
> **Bauler v. Pressed Steel Car Co.**, supra.

The following colloquy on the floor of Congress corroborates that a ruling of an agency would have to be one that was authoritative:

> "Mr. Celler: Does the gentleman think it fair to have the employer rely upon the administrative ruling or interpretation of law by anyone say, of the lesser echelons of the Wage and Hour Division, some insignificant servant or employee?
>
> "Mr. Walter: But the record discloses that the rulings are made by the Administrator—and this is Mr. Walling's testimony—the rulings are either made by him or made by somebody to whom he had delegated the authority to make the rulings. **I cannot imagine the important queries we have in mind ever reaching the desk of anyone without the authority to act thereon." 93 Congressional Record,** Part II, p. 1496, Feb. 27, 1947. (Emphasis ours.)

The rule that designated procedure be followed in order to constitute "agency" action requires that only action by

top agency officials be treated as agency action, because agencies with no authority to determine the coverage under the Fair Labor Standards Act have no procedural avenue for the resolution of such an issue, and so only the top agency officials can speak authoritatively.

The trial court stated that the term "agency of the United States" was intended to have a wide scope, and relied upon **29 U. S. C., Par. 251 (a) (9)**, as its authority. This section reads:

> "The cost to the government of goods and services heretofore and hereafter purchased by its various **departments and agencies** would be unreasonably increased and the public treasury would be seriously affected by consequent increased cost of war contracts; * * *." (Emphasis ours.)

Insofar as Finding 9 distinguishes between departments and agencies, it is difficult to perceive how the court could logically state that the term "agency" in Section 9 was broad enough to cover the term "department", specifically the War Department. Further, the "wide scope" theory is inconsistent with the rules of construction, as hereinbefore indicated.

The courts have also relied upon other statutory definitions for the term "agency" as a guide for what the term meant in the Portal-to-Portal Act. The Wage and Hour Administrator in his November 18, 1947, Bulletin, Section 790.19, referred to definitions in other federal statutes too, including the Federal Register Act, **44 U. S. C., Par. 304;** Federal Reports Act, **5 U. S. C., Par. 139;** and Administrative Procedures Act, **5 U. S. C., Par. 1001.** And the following cases mention them: **Rogers Cartage Co. v. Reynolds**, 166 F. (2d) 317, 320; **Burke v. Mesta Machine Co.**, supra, and **Jackson v. Northwest Airlines, Inc.**, 76 F. Supp. 121, 127.

The Administrative Procedures Act was in force at the time of the drafting of the Portal-to-Portal Act. Its purpose was to achieve reasonable uniformity and fairness in administrative procedures. It provided the following definition of "agency" [Subsection (a)]:

> " 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the Governments of the possessions, territories, or the District of Columbia. Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of Section 1002 of this Title, there shall be excluded from the operation of this chapter:
>
> (1) agencies composed of representatives of the parties or of representatives of the organizations of the parties to the disputes determined by them;
>
> (2) courts-martial and military commissions;
>
> (3) military or naval authority exercised in the field in time of war or in occupied territory, or
>
> (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947 . . ."

The Governor of Hawaii, under Section 67 of the Hawaiian Organic Act, **31 Stat. 153, c. 339, 48 U. S. C., Par. 532,** was authorized to call upon the Commanders of the Military and Naval Forces of the United States, and to place the territory under Martial Law. This he did. Appellants submit that the Military Government was the alter ego of the regularly established Territorial Government, rather than an agency of the Federal Government, and since the Government of the Territory is excluded from the definition of "agency", the Military counter-part thereof would also be excluded.

This argument was rejected by the court below, the court saying that

> "The Army with the emergency as the lever, persuaded the Governor of the Territory to declare Martial Law and to give to it powers, * * * and thereafter it enlarged the unlawful grant and set up an independent government, which all * * * were obliged to obey" (R. 49-50).

Assuming that the Military Government were not the alter ego of the Territorial Government, then surely it would come under Exception (3) or (4) of the definition of "agency" under the Administrative Procedures Act.

The court below claimed that the Army in Hawaii was not "in the field" or "in occupied territory". But the record in the case of **Duncan v. Kahanamoku**, supra, indicates differently. See **90 L. Ed. 711**, Testimony of Lt. General Robert C. Richardson, Jr., U. S. A., Commanding General of the Central Pacific Area.

> "* * * Q. You would not call Hawaii a combat zone?
>
> "A. Yes I would. * * *"

So that under three aspects of the Administrative Procedures Act, the Military Government was not an agency of the United States.

Since the Military order was not an administrative one, and the Military Governor was not actually vested with final authority to speak as the War Department, and further, since the Military order was not that of an agency within the usual statutory definition, it appears that the statutory requirements of an administrative ruling by an agency of the United States have not been met.

V.

Section 9 of the Portal-To-Portal Act of 1947 is Unconstitutional Because it Violates the Fifth Amendment of the United States Constitution.

When Congress passed the Fair Labor Standards Act in 1938, it conferred certain rights on working men and imposed certain obligations on employers. Subsequent to the enactment of this law the courts interpreted it and these interpretations were automatically read into the law. Both, before and after such interpretations, judgments were entered and satisfied, and settlements of claims were made. Congress then enacted the Portal-to-Portal Act and redefined rights and duties of employees and employers so as to take away certain of the established rights and purported to make that definition applicable to claims and lawsuits already in existence. Whether Congress can do so, depends of course on the nature of the right that has been established.

The Claims of the Appellants Were in Existence Before Passage of the Portal-to-Portal Act and Are Vested Rights Which May Not Be Divested by Retroactive Legislation.

The rights of the Fair Labor Standards Act became vested in the worker immediately as he put in his time. The employee did everything that was required of him to be done and performed his part of the bargain. All that remained was that the employer pay according to the terms of the Statute. This the employer failed to do, and the lawsuit is for money earned and due. Subsequent to the performance of the work, the law was enacted which sought to establish that good faith reliance on an administrative ruling, etc. would wipe out the claim of the

plaintiff where he had already performed work in reliance on the Fair Labor Standards Act. The Supreme Court of the United States has declared as follows on the proposition:

> "When a right has arisen upon a contract or a transaction in the nature of a contract authorized by statute and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the Statute does not affect it or an action for its enforcement. **It has become a vested right which stands independent of the Statute." Pacific M. S. S. Company v. Joliffe,** 2 Wall. (U. S.) 450, 457, 17 L. Ed. 805 (Emphasis ours.)

In **Overnight Transportation Company v. Missell,** 316 U. S. 572, it was said that workers are assured additional pay to compensate them for the period of a work week beyond the hours fixed in the Act; the wages were specified in the Statute and could not be changed by contract. It was the contract that had to be changed.

And in **Brooklyn Savings Bank v. O'Neill,** supra, the court said that these were statutory rights which could not be waived.

In **Reid v. Solar Corp.,** 69 F. Supp. 626 (1946), we find this language in the opinion:

> "An employee's claim for overtime compensation and liquidated damages under the Fair Labor Standards Act obviously constitutes property of which an employee may not be deprived without due process of law."

The rights with which we are here concerned therefore are not mere expectations of future benefit, but rights which arose and became vested immediately upon the employer's failure to make wage payments in accordance

ith the then statute. To hold otherwise would be to offer plum to him who violates the letter and spirit of the xisting law and can hold out in the payment of his just ebts until the law is changed. As a corollary, if such gislation which seeks to affect vested rights retroactively s upheld, it would penalize the employer who sought to omply with the law and pay his just debts.

To deprive the employees of these rights, pursuant to he Portal-to-Portal Act, is in violation of the Fifth mendment to the United States Constitution, in that it ould deprive appellants of their vested rights without ue process of law.

VI.

Work Performed by the Appellants Prior to December 7, 1941, Was Covered by the Fair Labor Standards Act.

Pursuant to a stipulation (R. 69), the work performed y the appellants during the period prior to December 7, 941, was divided into three categories: work done for (1) he federal government, (2) territorial government, (3) rivate industry. The trial court held (R. 79) that the ork performed for the federal government, with one exeption, was not within the scope of the Fair Labor Standrds Act for the reason that (1) it was work for the govrnment upon a military reservation, and therefore, was ot "commerce" or "production of goods for commerce"; 2) it was, with certain exceptions, all new construction.

As to the first point, it has been held that cost-plusxed-fee-contractors with the government engaged in war roduction are not agents of the government and do not hare the government's sovereign immunities. **Alabama . King and Boozer**, 314 U. S. 1; **Curry v. United States**, 14 U. S. 14.

The production for interstate commerce by or for the government is production for commerce within the meaning of the Act. **Umthum v. Day and Zimmerman**, 235 Ia. 293, 16 N. W. (2d) 258; **Timberlake v. Day and Zimmerman**, 49 F. Supp. 28. In **Bell v. Porter**, 159 F. (2d) 117, certiorari denied, 330 U. S. 813, the court said:

> "The constitution confers upon Congress the power to regulate commerce among the several states. This power to regulate commerce is not confined to commercial or business transactions. From an early date, such commerce has been held to include the transportation of persons and property no less than the purchase, sale, and exchange of commodities. **United States v. Hill**, 248 U. S. 420, 423, and goods may move in commerce though they never enter the field of commercial competition."

McLaughlin v. Todd & Brown, Inc., 7 W. H. Cases 1014. **Bauler v. Pressed Steel Car Co.**, 81 F. Supp. 172, 175.

As to the matter of new construction, it has been held that new construction of an instrumentality of commerce does constitute commerce within the meaning of the Act. See **Ritch v. Puget Sound Bridge and Dredging Co.** (CCA 9), 156 F. (2d) 334. Those projects which would be covered by the Fair Labor Standards Act under the ruling of the **Ritch** case, supra, would be (1) additions to the battery charging distribution system, Pearl Harbor Submarine Base, (2) servicing landing mat at Ewa, mooring mast area at Pearl Harbor, radio shelters (since radio facilities even aboard naval vessels transmit commercial messages on occasion and are in interstate commerce).

Under work done for the territorial government, the new territorial wharf at Port Allen, Kauai, would come under the Fair Labor Standards Act under the theory of the

Ritch case, supra, and **Walling v. Patton Tully Transportation Co.**, 134 F. (2d) 945.

Pertaining to the projects for private industry, appellants submit that the building of the new wharf for the Inter-Island Steam Navigation Co. is covered by the Act. Such a wharf would be an instrumentality of commerce and would be covered under the theory of **Walling v. McGrady Construction Co.**, 156 F. (2d) 932; **Overstreet v. North Shore Corp.**, 318 U. S. 125; and **Pedersen v. Fitzgerald Co.**, 318 U. S. 740. The erection of a new pier and shed, Pier 29 for the Inter-Island Steam Navigation Co. at Oahu (R. 83), would be covered under the Act for the same reasons. The same would apply to new sub-stations at Hickam Field for Mutual Telephone Co. Digging and filling trenches for Hawaiian Electric Co., Ltd., and for the Honolulu Gas Company would also be covered under the Act for the same reason, insofar as the electric power and gas would be used to produce goods for commerce. These facilities substantially are projects upon which neither the courts nor the Administrator have been too clear as to coverage. The opinion of this court is therefore sought to clarify the doubts in reference to these projects and to determine whether or not the Act is applicable to these activities.

CONCLUSION.

Appeal has been taken to this court because there has been presented to the courts a novel kind of "ruling" by the Military Governor as a defense under Section 9 of the Portal-to-Portal Act of 1947. In none of the cases coming before the courts, which have arisen in continental United States, could a situation, which is unique to Hawaii, occur. There is no question but that the situation described in the record, which was prevalent in the Hawaiian Islands

during the war years from Pearl Harbor Day on, was not within the Congressional contemplation when the Portal law was created. The lower court, in applying the good-faith defense to the instant case, makes that defense far reaching, and extends the Congressional intent beyond that contemplated.

Appellants submit that if this kind of interpretation is permitted to stand, it would mean that during time of war civil laws enacted for the benefit of the people could be wiped out by the pretext of a doubtful military order, the result of the judgment of one Military General.

Not only would such a decision adversely affect the claims of employees in the instant case, but those of all other employees who have filed similar claims for work performed on the Islands during the period of Martial Law.

The Fair Labor Standards Act, when it was enacted in 1938, was hailed throughout the length and breadth of the land as an emancipation of the working man and an elevation of his standard of living. To give the broad construction to the order, which has been held here applicable, would be to defeat completely the remedial purposes of the Fair Labor Standards Act, and render all the good work it has done in the intervening years a nullity. What the decision of the lower court does is to sanction a device for employers to avoid the intent of Congress.

Until the Congressional policy, as established by the Fair Labor Standards Act or the Portal-to-Portal Act, is changed its intention should be respected, and the requirements of the Fair Labor Standards Act remain the controlling law, otherwise we have the situation described in the **Kahanamoku** case of substituting a government by men for a government by law.

It is respectfully submitted for all the reasons stated herein that those parts of the judgment, from which appeal has been taken, are erroneous and should be reversed with costs to the appellants.

Respectfully submitted,

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APPENDIX A.

This colloquy between Senators Cooper, of Kentucky, a member of the Senate Sub-Committee and of the Conference Committee, Donnell of Missouri, Chairman of the Senate Sub-Committee, considering the bill, and Ferguson of Michigan ensued in response to the following problem, (the **Northwest Airlines** case) presented by Senator Thye of Minnesota: An employer under the rulings of the Wage and Hour Administrator believed himself to be subject to the Wage and Hour Act. Then an official of the Railway Labor Board ruled that the employer was not subject to the Wage and Hour Act. The employer acted in accordance with the latter ruling. In fact, the employer, secured indemnification on his government contract against an adverse judgment by the court. Is the defense available to the employer?

93 Congressional Record 4451, 4452, May 2, 1947.

"Mr. Cooper: It is my personal opinion that a court should interpret this section strictly. The burden of proof is placed upon the employer. I believe that the courts should require proof of reliance and proof of good faith. It is my opinion that in the case which the Senator has stated that is an arguable question. Personally, I think that if two situations were presented to an employer as they have been stated in the Senator's question, where it was possible for an employer to rely upon the ruling of one agency or upon the ruling of another agency, the question would of course arise as to whether he had a right to rely upon a ruling of the Railway Labor Board.

"Secondly, the Senator has stated that in this instance the employer did rely upon the ruling of the Railway Labor Board and, as I believe, asked indemnification

from the Treasury. So it seems to me that the question could properly be considered as to whether it was a good faith reliance or whether the employer was simply choosing a course which was most favorable to him.

"As the senior Senator from Missouri (Donnell) said yesterday, and which I must repeat, in every case it is a question of fact for the determination of the court. It is my opinion that it should be interpreted strictly and that in a case where an employer chose a course which was to his own advantage it would be a question as to whether he acted in good faith."

"Mr. Donnell: * * * It seems to me that it is a question of fact, under all the circumstances, a question to be decided by the court first, whether or not the employer has sustained the burden of proof by showing that he acted in good faith and in conformity with or in reliance on an administrative regulation, ruling, order, or interpretation. All the facts in the particular case must be taken into consideration.

* * * * * * *

"It seems to me that when the question is presented to the court, as the distinguished senator from Kentucky has so well stated, the court will have before it the fact that the burden of proof rests upon the employer; second, that every fact within the cognizance of the court, the evidence in the case, must be taken into consideration. Even the demeanor of the witnesses will be required to be taken into consideration in the matter; third, that the court in determining whether or not the employer was or should be considered to have been protected by the provisions of Section 9 which was approved yesterday, must find, 1st, that the employer has pleaded, and, second, that he has proved that the act or omission complained of was in good faith, in conformity with and in reliance on the ruling of the Railway Labor Board official to whom the Senator has referred.

"I do not think it is possible or advisable to attempt to say here that judgment should be rendered for the defendant. It is a question of fact to be determined by the court under all the facts of the case."

* * * * * * *

"Ferguson: * * * is not the question of fact to be determined by a judicial body? If it were before a jury it would be submitted to the jury on a charge by the court concerning the doctrine of good faith, and if the jury found that the facts came within the rule of laws laid down it could determine that the party acted in good faith or not, as it might desire. It is one of those indefinite things about which it is always difficult to legislate. It is like the law on the question of negligence. In the law of negligence it has been impossible to lay down a specific and certain definition of negligence, so the law allows the question of fact to be presented as to whether what was done was what an ordinary prudent person would do under the same or similar circumstances. So we have here the question, Did he act in good faith relying upon the order, or did he act in bad faith and so use the order that he might benefit by it? If he did the jury or the court would naturally decide against him. Is not that correct?"

"Mr. Donnell: Yes."

* * * * * * *